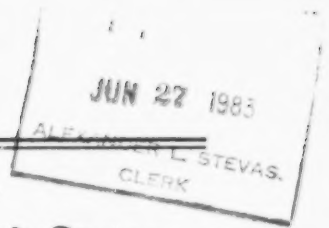


No. 82-1880

IN THE

Supreme Court of the United States

October Term, 1982



NORRIS INDUSTRIES, INC.,

Petitioner,

v.

INTERNATIONAL TELEPHONE
AND TELEGRAPH CORPORATION,
and

DAVID L. LADD, REGISTER OF COPYRIGHTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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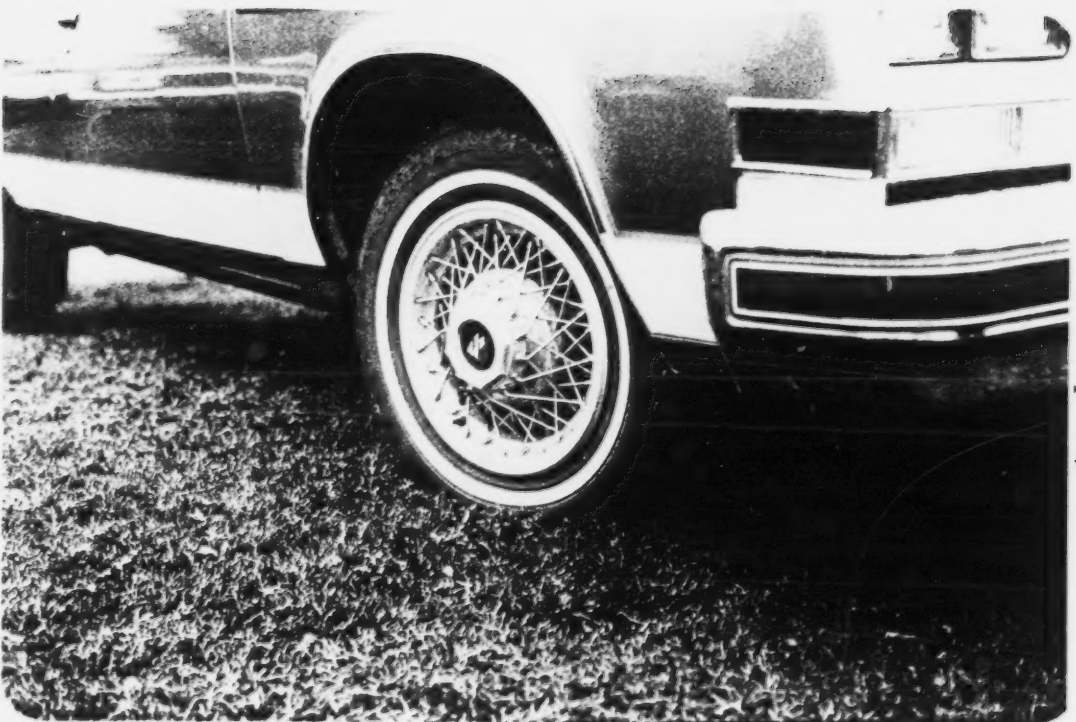
E-1

NORRIS Photograph Of Record
(Vol. 4, p. 639)



E-2

NORRIS Photograph Of Record
(Vol. 4, p. 641)



IN THE
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OCTOBER TERM, 1982

NORRIS INDUSTRIES, INC., *Petitioner,*
v.
INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION
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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Norris' Petition for a Writ of Certiorari raises no genuine issue requiring this Court's attention. The Copyright Office and the courts below unanimously rejected Norris' copyright claims in wheel covers (hubcaps), since they are utilitarian industrial designs, are not works of art and do not possess any independent and separable features identifiable as works of art. They are not entitled to an effective 75 to 100 year monopoly under the copyright statute.*

* Note: See Appendix for listing of Corporate Parents, Subsidiaries, and Affiliates of International Telephone and Telegraph Corporation.

COUNTER-STATEMENT OF THE CASE

Norris' statement of the case is argumentative and assumes facts not in evidence.¹ An unbiased statement of the case is found in the Eleventh Circuit's opinion (as reproduced in the Norris Petition, pp. B-2 to B-3). The Eleventh Circuit's three-judge panel unanimously affirmed the district court's judgment. Norris petitioned for rehearing *en banc*, which was denied by order of March 18, 1983. Not a single judge requested that the court be polled pursuant to Rule 35, F.R.A.P. The mandate issued on April 19, 1983. Norris sought neither stay nor recall of the mandate, so the case is now before the district court for further proceedings.

SUMMARY OF THE ARGUMENT

The Copyright Office and the courts below unanimously agree that Norris' copyright claims are a meritless attempt to secure a monopoly on industrial designs for wheel covers. This is expressly forbidden by the copyright statute, which protects works of art, but not industrial designs. Congress, in enacting the current statute, intended "to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design".² The courts below found beyond dispute that Norris' wheel covers fell on the industrial design side of the line, and granted summary judgment invalidating Norris' copyright claims.

The courts below fully considered the decisions of other circuits and explained that their opinions harmonize with precedent, which uniformly holds that works of industrial design such as wheel covers are uncopyrightable.

¹ For example, the Norris Petition (p. 6) states as a fact that ITT copied Norris' designs. No such fact has been established by Norris or conceded by ITT. Also, Norris incorrectly implies that 37 C.F.R. §202.10(c) as reproduced in the Norris Petition (p. D-1) is still in force.

² H.R. Rep. No. 1476, 94th Congress, 2d Session 55 (1976) (as reproduced in Norris Petition, p. B-11 n. 9).

Summary judgment was proper since Norris raised no genuine issue of material fact; Norris cannot seriously contend that the summary judgment procedure, as established by Rule 56, F.R.Civ.P., is itself a violation of due process.

Norris' theory that the obviousness standard for issuance of a patent under *Graham v. John Deere*, 383 U.S. 1 (1966), somehow should be extended to issuance of a *copyright* on an alleged work of art only highlights the fact that Norris' wheel covers should be protected, if at all, only under the patent law.³ While patent law affords a maximum monopoly term of seventeen years, copyright (if afforded to industrial designs as urged by Norris) would provide an effective 75 to 100 year monopoly.

ARGUMENT

I. The Circuit Courts Uniformly Recognize the Congressional Mandate That Works of Industrial Design Such as Wheel Covers Are Uncopyrightable.

The automotive wheel covers in suit are not copyrightable because they are nothing more than industrial designs of a useful article, rather than works of art. Congress did not intend such industrial designs to be afforded copyright protection. Congress since 1914 has repeatedly rejected approximately 70 design protection bills that would have made copyright protection available for industrial designs.⁴

A proposed Title II of the Copyright Act of 1976 (which would have provided for copyright in industrial designs) was deleted from the final bill because of a strong objection by the Justice Department to "creation of [a] new form of intellectual property" and a concern over the anticompetitive effects inherent in granting a 75 to 100 year monopoly over the design of consumer

³ Norris' theory is so tenuous as to require no further comment.

⁴ See discussion in the leading case *Esquire, Inc. v. Ringer*, 591 F.2d 796, 800 n. 12 and n. 13 and text (D.C. Cir. 1978).

goods. H.R. Report No. 1476, 94th Congress Second Session 50 (1976); Congressional Record H. 31979 (September 22, 1976).

The decision of the Second Circuit in *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980), does not contradict the established principle that works of industrial design such as wheel covers are uncopyrightable. As explained by the Eleventh Circuit,⁵ the Second Circuit in *Kieselstein*, in a decision admittedly "on a razor's edge",⁶ considered the facts that (a) the Copyright Office had granted registrations to the belt buckles there in issue and (b) the buckles fell within the category of jewelry, which has traditionally been regarded as copyrightable, to support a finding of copyrightability. No comparable facts are present here.⁷

Importantly, the Norris wheel covers were not denied copyright because they do not fall within the traditional definition of art, but because they do not fall within *any* definition of art (as opposed to industrial design) recognized by the statute. The *Kieselstein* jewelry, falling as it did within the traditional definition of art, was not uncopyrightable industrial design.

That a particular category of work, such as jewelry, has traditionally been regarded as copyrightable applied art rather than uncopyrightable industrial design does not violate the *Bleistein* precept not to deny copyright to an individual work based on lack of artistic merit.⁸ Neither the District Court nor the Elev-

⁵ As reproduced in the Norris Petition, p. B-12.

⁶ 632 F.2d at 990.

⁷ There is no conflict between the circuits—the Second Circuit found the buckles primarily ornamental and hence conceptually separable because they were worn as jewelry on the body, a well-recognized type of copyrightable work. The Norris hubcaps are not jewelry. Even if a single district judge in *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 95 F.R.D. 95 (D. Del. 1982), allegedly failed to appreciate the harmony between *Esquire* and *Kieselstein*, this cannot create a conflict between the circuits where none exists.

⁸ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903); *Mazer v. Stein*, 347 U.S. 201 (1954). These opinions precluding denial of copyright based on lack of artistic merit are not in issue, because Norris' copyright claims were rejected as not falling within *any* definition of art (as opposed to uncopyrightable industrial design), not because they lacked artistic merit under "traditional" standards.

enth Circuit made any comment, one way or the other, on the alleged artistic merit of Norris' wheel covers. It is the statute itself, forbidding copyright registration for the overall category of industrial designs, which led to rejection of Norris' copyright claims.⁹

II. Summary Judgment Here Accords With Due Process.

Norris cannot seriously contend that the summary judgment procedure established by Rule 56, F.R.Civ.P., and applied here violates due process. Norris' claims were fully considered and soundly rejected by:

- a) The Copyright Office (four times);
- b) The District Court;
- c) A unanimous three judge panel of the Eleventh Circuit; and
- d) All the sitting judges of the Eleventh Circuit, in denying Norris' petition for rehearing *en banc*.

Norris' affidavits by persons styled as experts suffice neither to establish a disputed genuine issue of material fact, nor automatically to preclude summary judgment. *United States v. Various Slot Machines on Guam*, 658 F.2d 697, 700 (9th Cir. 1981); *Fame Publishing Co., Inc. v. Alabama Custom Tape, Inc.*, 507 F.2d 667, 672 (5th Cir. 1975); *Ronel Corporation v. Anchor Lock of Florida, Inc.*, 325 F.2d 889 (5th Cir. 1963), *cert. den.*, 377 U.S. 924 (1964); *Janex Corporation v. Bradley Time*, 460 F.Supp. 383 (S.D.N.Y. 1978). Nor can they preclude judicial

⁹ Norris' insistence that the Copyright Office must consider scientific testimony to determine whether the Norris hubcaps are useful objects is clearly impractical, in view of the tens of thousands of copyright applications which must be processed monthly. The Copyright Office is entitled to make an administration determination that certain types of articles (such as hubcaps) are utilitarian, without making a scientific inquiry into the efficiency of any particular hubcap design. The efficiency of the Norris hubcaps is of no moment, as recognized by the Eleventh Circuit (Norris Petition, p. B-7 n. 8).

notice of facts of common knowledge, *Brown v. Piper*, 91 U.S. 37, 43 (1875), such as the utilitarian nature of hubcaps.¹⁰

Contrary to Norris' implications, the courts below did not render uncritical deference to the decision of the Copyright Office that Norris' wheel covers are unregistrable. The practice of the Copyright Office is entitled to great weight. See, e.g., *Mazer, supra*, 347 U.S. at 213. As aptly stated by Circuit Judge Leventhal (concurring):

"The subject-matter of copyrights is such as to suggest that rarely if ever will a ruling denying an application for copyright on the basis of the application of a regulation be considered a contravention of a duty owed to the applicant. There is jurisdiction but no large likelihood of successful invocation". *Esquire, supra*, 591 F.2d at 808.

¹⁰ That a district judge in another case (*Trans-World, supra*), on facts different from those here, exercised his discretion under Rule 56, F.R.Civ.P., to deny summary judgment, does not preclude summary judgment here. ITT and the Copyright Office need only show that summary judgment was proper in this case (as they have done), and not that summary judgment is proper in all other copyright cases involving alleged works of art. Note that the plaintiff copyright claimant in *Trans-World* has since dismissed its copyright cause of action. Letter Ruling of April 7, 1983, *Trans-World Mfg. Corp. v. Al Nyman & Sons*, C.A. 81-471, D. Del. (Wright, J.) (unreported).

CONCLUSION

The Norris petition is plainly frivolous and should be summarily denied.

Respectfully submitted,

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APPENDIX

Corporate Parents, Non-wholly Owned Subsidiaries, and Affiliates of International Telephone and Telegraph Corporation:*

Abbey Life Insurance Company of Canada, Amar Hotel Investment Corp., Atlanta Hotel Associates, Bell Zaire Szarl, Cannon/Jae Ltd., Compania Internacional de Telecomunicacion y Electronica SA, Compania Standard Electrica Argentina, Continental de Alimentos, Convention Plaza East Hotel, El Conquistador Hotel Associates, Elektro-Treuhand GmbH, Excess Underwriting Management GmbH, F.A. Knight & Son S.A., Fabrica de Equipo de Telefonos SA (FETSA), Far East Switches Ltd., Federal Electric Alireza Ltd., Feuerbacher Volksbank, Friedrich Grohe Armaturenfabrik GmbH & Co., Gallital Iberica SA, Globe Mackay Cable & Radio Corp., Grays Harbor Paper Co., Grohe Handelsgesellschaft mbH, Grundstücksgemeinschaft L'Orange, Kunzler, Knauer, Hotels Sheraton de Portugal Sarl, H.W. Liebrich GmbH, Industria de Telecomunicacion, Interessengemeinschaft fur Rundfunkrechte, International Telecommunication Center SA, ITT Composants Et Instruments, ITT Comunicaciones Mundiales SA (Chile), ITT Maroc Limited, ITT Niles Co. Inc., ITT Switches (WK) Limited, ITT World Directories (U.K.) Ltd., ITT World Directories Inc., Kabeltrommel GmbH, London-Canada Insurance Company, Maister Directories Pty. Ltd., Marconi Espanola S.A., Metalicht, B.V., Metalicht N.V., Munchener Autozubehor GmbH, Munchner Motorzubehor GmbH, National Continental Corporation, Ltd., Private Investor Co., Promedia SA, Publimedia BV, Riverpark Development Co., Schmoele & Comp., Sheraton Tunisia Management Corporation, SKI Times Square Enterprises, SNV Studiengesellschaft f. Nahverkehr GmbH, Sistemas de Bombeo SA de CV, Sociedad Inmobiliaria San Cristobal SA, Sociedad Industrial de Electromagnetismo Sarl, Societe d'Exploitation des Cables Electriques, Societe de Materiel Montparnasse Sod-

* Defined in accordance with SEC Regulations, 17 CFR §240.12b-2.

evan & Cie SA, Societe Immobiliere Hoteleliere Montparnasse S.A., Southwest Producing Company of Canada Limited, Standard Electric Alireza Limited (Seal), Standard Elektrik Lorenz AG (Sel), Standard Electric S.A. (Spain), Standard Telefon Og Kabelfabrik AS (STK), Standard Telephones and Cables Public Limited Company, Suez Electronics S.A.E., Taiwan International Standard Electronics, Ltd., Teleannons Ab., Telephone Electronic Machines S.A., Wilton, Sutter and Co., Wonder del Centro S.A. de C.I. Mexico.